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No. 664

In the Supreme Court of the United States

OCTOBER TERM, 1931

PIEDMONT & NORTHERN RAILWAY COMPANY,
PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY ET AL., RESPONDENTS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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APRIL, 1932.

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OCTOBER TERM, 1931

No. 664

PIEDMONT & NORTHERN RAILWAY COMPANY, petitioner

v.

INTERSTATE COMMERCE COMMISSION, SOUTHERN Railway Company et al., respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

DECISIONS OF THE COURTS BELOW

On May 23, 1931, the United States District Court for the Western District of South Carolina, Honorable J. Lyles Glenn, Judge, handed down an opinion, supported by special and general findings of fact and conclusions of law awarding an injunction as prayed in a case wherein the Interstate Commerce Commission and five railroads were

plaintiffs and the Piedmont & Northern Railway Company was defendant. In a decree duly entered under date of June 9, 1931, pursuant to the aforesaid opinion, the defendant was forbidden to extend its lines of railroad by constructing certain new mileage except under certificate of public convenience and necessity duly issued by the Interstate Commerce Commission. The decision of the District Court is reported in 51 F. (2d) 766.

The Piedmont & Northern perfected its appeal to the United States Circuit Court of Appeals, Fourth Circuit, from which court, and before hearing therein, the case has been removed to this Court by writ of certiorari.

The facts, as well as the law involved in this case, have previously been considered by a three-judge court convened pursuant to the Urgent Deficiencies Act (38 Stat. 219, U. S. C. 28, Sec. 47) in the case of *Piedmont & Northern Railway Company* v. *United States,* 30 F. (2d) 421. Upon appeal to this Court the decree of the three-judge court was reversed upon the ground that the Court should have dismissed the bill for lack of jurisdiction instead of upon the merits. (280 U. S. 469.)

QUESTIONS PRESENTED

The primary question presented for determination is whether the Piedmont & Northern may lawfully extend its lines without securing from the Interstate Commerce Commission a certificate of convenience and necessity as provided for in the

Interstate Commerce Act as amended, Section 1 (18), (19), and (20). This involves a secondary question whether the Piedmont & Northern comes within the exception stated in paragraph (22) of the aforesaid section of the Act, providing that the Commission shall have no authority over extensions of—

> street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

STATUTES

The following are the statutory provisions of the Interstate Commerce Act directly involved in this case:

Section 1:

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by

railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such rights or

privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph 18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate

facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

STATEMENT

This is an appeal from a decree of injunction against the Piedmont & Northern Railway Company, petitioner herein, to prevent the construction

of threatened extensions of its railway lines without first securing from the Interstate Commerce Commission a certificate of public convenience and necessity. The suit below was instituted by the Interstate Commerce Commission in April, 1930, under authority stated in paragraph (20) of Section 1 of the Interstate Commerce Act, which provides that construction or abandonment contrary to the terms of the statute may be enjoined at the suit of the United States, the Commission, or any party in interest. As parties in interest, several steam railroads, operating in the same territory with the existing Piedmont & Northern lines and through which the proposed lines would run, were permitted by the Court to intervene and join with the Commission as parties plaintiff.

Petitioner, for nearly 20 years previous to the institution of this suit in the lower Court, has owned and operated continuously two separate sections of electrically powered railroad located in North and South Carolina. The South Carolina section extends from Greenwood to Spartanburg, with an extension from Belton to Anderson, a total mileage in South Carolina of 101 miles. The North Carolina section extends from Gastonia to Charlotte, with an extension from Belmont Junction to Belmont, a total mileage in North Carolina of about 27 miles. The total mileage in both states is about 128 miles. (R. 183, 404.) The road connects with other railroads and is engaged in interstate trans-

portation, the larger portion of which is freight, as a participating carrier in through routes and joint rates under duly published tariffs.

On March 26, 1927, the petitioner filed an application with the Commission, under paragraphs (18) to (21) of Section 1 of the Act, for a certificate of public convenience and necessity requiring and permitting it to construct a line of railroad using electricity as a motive power (denominated by the petitioner in the application as "an interurban electric railway") between Spartanburg, S. C., and Gastonia, N. C., and a similar line from Charlotte, N. C., in a northeasterly direction to Winston-Salem, N. C. This application was designated by the Commission as Finance Docket No. 6208, *Proposed Construction of Lines by Piedmont & Northern Railway Company,* reported 138 I. C. C. 363.

In said proceeding the applicant (the petitioner in this case) contended that the Commission should (under authority of *Texas & Pacific R. Co.* v. *Gulf, etc. Ry.*, 270 U. S. 266) declare that it had no jurisdiction over the proposed extensions for the reasons, first, that the proposed extensions were not covered by the provision referred to because they had been "undertaken" prior to May 29, 1920, *"which was 90 days after"* paragraph (18), supra, took effect; and second, that the applicant operated, and proposed to construct extensions of, an electric interurban railway such as paragraph (22) of Section 1 of the Act expressly exempted from the con-

trol of the Commission. The Commission overruled both contentions and, holding upon the merits that the public convenience and necessity did not require or justify the proposed extensions, denied the application. (R. 6, 138 I. C. C. 363.)

The lines of the petitioner extended as proposed would have been about 256 miles in length and would have extended continuously from Greenwood, S. C., to Winston-Salem, N. C. (R. 8, 424.)

On May 22, 1928, the Piedmont & Northern brought suit in the United States District Court for the Western District of South Carolina against the United States, under the Urgent Deficiencies Act (38 Stat. 219), alleging that the Commission was without authority over the proposed construction for the reasons above set out as stated in the original application to the Commission, and praying that the order of the Commission in taking jurisdiction of the same and denying same upon the merits be set aside and annulled. The Commission and certain interested railroad companies intervened and were made parties defendant. The case was submitted to a three-judge court, consisting of Circuit Judges Wadill and Northcott, and District Judge Soper, upon the record made before the Commission. The opinion rendered by Judge Soper, and concurred in by both the other judges, held that the proposed construction was within the jurisdiction of the Commission and that there appeared to be no legal ground for questioning the

correctness of the Commission's decision. (30 F. (2d) 421.) Upon appeal by the Piedmont & Northern to this Court, it was held that the order of the Commission denying the application was negative in character and therefore not within the class of Commission orders subject to attack under the Urgent Deficiencies Act. The Court therefore reversed the lower Court and remanded the case to the District Court with instructions to dismiss for want of jurisdiction. (280 U. S. 469.)

After the denial by the Commission of the petitioner's application for a certificate of convenience and necessity and its failure in the District Court and this Court to have the action of the Commission changed, the company, on March 10, 1930, at a duly convened meeting of its board of directors, passed a resolution directing its officers to proceed toward the completion of the lines of railroad as originally planned, by beginning immediately the construction of a line of railroad between Spartanburg and Gastonia to connect together the existing sections of the railroad. At the same meeting it was resolved that the plan to complete the lines of the company as the same were originally projected (from Greenwood, S. C., to Durham, N. C., Winston-Salem, N. C., and various other points) was not abandoned, but was then reaffirmed and approved. (R. 123, 438.) Copies of these resolutions were forwarded to the Interstate Commerce Commission and a small amount of

grading was done between Spartanburg and Gastonia. (R. 424.)

Petitioner having thus indicated its purpose and intention to proceed with the construction without a certificate of public convenience and necessity from the Commission, the Commission, under paragraph (20) of Section 1 of the Interstate Commerce Act, brought this suit to enjoin the illegal construction.

At the trial of the case in the District Court, both the plaintiffs and the defendant introduced voluminous evidence, the substance of which is quite fully summarized by the Court in its "Special Findings of Facts." (R. 402, 433.) In its Assignment of Errors the petitioner makes complaint that the Court *failed* to make certain detailed findings with respect to electrical equipment and manner of operation and to point out that certain features were not found in ordinary steam railroads, but does not question the correctness of the facts found. (R. 494–500.) The Court's Special Findings of Fact may, therefore, for the purposes of this appeal, be taken as supported by the evidence. Said findings will, in many instances, be referred to herein as authority for our statements relative to characteristics of the road in question.

From the evidence the Court concluded that the petitioner had threatened, and was about, to construct an extension of its line of railroad without a certificate from the Commission and in violation

of paragraph (18) of Section 1 of the Interstate Commerce Act as amended, and that the respondents (plaintiffs) were, under paragraph (20) of said section, entitled to prevent by injunction the construction of said extension unless the petitioner should first secure a certificate of convenience and necessity from the Commission. The Court further found that the petitioner's existing lines were not, and that its proposed lines if constructed would not be, interurban electric railways within the meaning of the exception contained in paragraph (22) of said section. Finally, the Court found that the respondents were entitled as a matter of law to the injunction prayed.

SUMMARY OF ARGUMENT

1. The Piedmont & Northern, whose major operations are identical with those of the steam roads, whose revenues are 94 per cent derived from freight, whose said freight is mostly carload traffic, mostly interchanged with the steam roads and mostly moving interstate, is not rendered an interurban electric railway within the meaning of the clause, which excludes street, suburban, or interurban electric railways not operated as part of a general steam system from Commission authority over the construction of new lines of railroad, merely because its motive power is electricity, because it operates between cities and because a very minor part of its service has characteristics peculiar to local electric railways.

2. The words "interurban electric railway" have no settled meaning at law, and they are not defined in the Act. In determining whether particular construction falls within the class excepted from Commission authority, the surest guide is furnished by the context and by the relation of the specific provisions to the railroad policy introduced by Transportation Act, 1920. Compare *Texas & Pacific Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266.

3. Under the terms of Section 15a the Commission must include the Piedmont & Northern with the steam roads when adjusting rates so as to yield a fair return on aggregate group property value, and Section 15a and paragraphs (18)–(22) of Section 1, herein involved, are among the interrelated amendments added by the Transportation Act, 1920, with the one objective of promoting a generally effective transportation service at just and reasonable rates, and the latter provisions, namely, those placing restrictions upon competitive and unneeded new construction, are particularly essential to the plan in order that the aggregate property value upon which rates paid by the public are to be based shall not be enlarged beyond the general transportation needs, and that the financial stability of established systems of transportation shall not be endangered.

4. While the fact that the electric interurbans excepted from the Commission's Section 15a authority to make group adjustment of rates are lim-

ited to those not engaged in general transportation of freight shows that uniformity of freight rates was regarded to be in all cases essential, the fact that the electric interurbans excepted from the Commission's authority over new construction and over the issuance of new securities are not so limited does not show that all railroads operating between cities with electric locomotives, whatsoever their character and purpose, are to be quit of the Commission's said authority, but merely demonstrates that Congress desired to leave those matters to local authority, if such railroads are principally designed for the usual local electric railway purposes, even though to some extent intended for general freight transportation; to give the difference in language a broader scope than this would frustrate the plan of Congress in essential particulars and would be contrary to the rule that excepting clauses should be narrowly construed so as not to destroy the remedial processes intended to be accomplished.

5. The "dovetail" relationship of the provisions comprising the plan of Congress for an effective and coordinated general transportation system refutes the Piedmont & Northern's position that it is permissible thereunder for it to avail itself of certain provisions, enabling it to become an important link with the steam roads in the general transportation chain, while at the same time refusing to submit itself to the restrictive provisions,

essential to the good of the transportation system as a whole.

6. Appellant's reasoning to the effect that Congress, by using the words "interurban electric railway" in the exception to Commission authority over the construction of new lines, showed an intention to exclude all electric railroads operating between cities from the national field of authority because railroads constituting links in the national transportation chain were already employing electric locomotives when the 1920 Act was passed is to argue that Congress intended to permit any railroad to be quit of restraint in respect of extensions or new construction of lines if it used or adopted electric motive power.

ARGUMENT

I

The Piedmont & Northern's proposed lines are not such as fall within the meaning of the exception contained in Section 1 (22), excluding from Commission authority the construction of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation

Paragraph (18) of Section 1 provides that—

> no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience require or will require

the same. Paragraph (22) of Section 1 provides that the authority so conferred upon the Commission—

> shall not extend to the construction * * * of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The Piedmont & Northern, although contending that it is an interurban electric railway and as such not subject to the requirement of Section 1 (18) of the Act that Commission authority must be first obtained before extension of lines is undertaken, nevertheless admits that it is a common carrier by railroad, and, in most respects, subject to the Act. (R. 2–3 and 59–60.) Except for a few features affecting a minor part of its operations, which will later be described, it is in fact just as much an ordinary railroad as if it had heretofore been operating by steam power in interstate commerce and had only now decided to operate with electric power.

The Piedmont & Northern was incorporated by act of the South Carolina legislature as an ordinary railroad company having full powers of eminent domain. (R. 403.) It has acquired and operated the lines hereinabove described, of which only a very small proportion of its main-line tracks were located in streets and highways, the line being generally carried around the larger towns and

cities instead of going through them. (R. 404.) It was promoted by a group of men, headed by the late James B. Duke, who were interested in the development of electric power in the Piedmont region of the Carolinas. This group was also interested in textile, tobacco, and other industries in the Piedmont regions of North and South Carolina. From its inception, the plan of the promoters was to divert freight traffic from existing steam railroads to the Piedmont & Northern and new interstate steam railroad connections. Pursuant to this plan the company, before it had constructed any of its lines, entered into a traffic agreement with the Seaboard Air Line Railway Company to create a new joint interstate traffic route in connection with that railroad. (R. 404–407.) Since it was admitted by petitioner at the hearing and is reiterated in its brief filed in the lower Court that the proposed new construction, if completed, would be similar in design and equipment and used in the same way as the petitioner's existing lines, the features of the construction and operation of the existing lines at and about the time of the institution of the present suit may be taken as representative of what the proposed lines would be. (See respondents' request for special findings of fact, paragraph IV, R. 113.)

Petitioner's lines are of standard gauge, standard railroad construction, modified only in the respects proper to the use of electricity as motive power. Outside the cities the lines are on private

rights of way, of the standard of single-track steam railroad construction. Only about 3 per cent of main-line mileage is in city streets. All tracks are capable of efficient handling of freight cars of the type used by railroads generally throughout the country. The maximum grade of the line is one per cent. Eighty-pound rails are used, and the line has been maintained in excellent condition. (The petitioner has stated that it intends to install 100-pound rails in the proposed new track, if built, and that in the proposed new construction separate through track would carry freight around the towns.) No differences in construction except those incident to the use of electricity instead of steam power distinguish the tracks of petitioner from those of steam railroads in the vicinity. (R. 411, 412.)

The petitioner owns 287 freight cars, all of which are interchanged freely with connecting steam railroads under the standard per diem arrangement, and which are identical with freight cars owned by the steam roads, in all respects, including brakes, safety appliances, automatic couplers and other devices. It also owns an office or business car of the standard type used by the officers of steam railroads. Trains of as many as 65 freight cars may be hauled by two of petitioner's electric locomotives controlled by one driver, and trains of 40 to 45 cars are quite usual. Petitioner's passenger cars are mostly self-propelled, though it has two

which, being without motors, must be used as trailers. (R. 412–413.)

The petitioner has operated through Pullman cars in connection with the Seaboard Air Line Railway Company, is a member of the Southeastern Passenger Association, publishes and sells passenger tickets to all parts of the United States in connection with the steam railroads. It sells tourist tickets to Norfolk, Washington, and northern points in connection with steam railroads and checks baggage on passenger tickets through to all destinations. It interchanges passengers on through interchange tickets, but with the exception of the through Pullmans above mentioned, it does not interchange any passenger cars with the connecting steam railroads. (R. 414.)

In its freight business the petitioner interchanges package freight in interstate through transportation, as well as loaded freight cars. It handles its freight business in the same manner as do the single-track steam railroads in the same territory, except as to incidental differences arising from the use of electric motive power instead of steam. It has an operating rule book similar in substance to the rule book of the Southern Railway Company, differing only in so far as would arise from the fact that the Southern has double-track operation with steam power and the petitioner has single-track operation with electric motive power. The petitioner's through and local freight trains are operated in substantially the same manner as similar

trains upon the steam railroads, moving under train orders, clearance cards, meet orders, rules as to superior and inferior trains, air brakes, hand brakes, and train connections. The petitioner's signal system is similar to that used by some of the steam railroads, although it is not of such high class as is generally used by the longer lines of steam railroads in the territory. Industries are served by the petitioner directly from its lines and industrial tracks in substantially the same manner as industries are served by the steam railroads in the vicinity. Distribution of incoming and outgoing freight and transfer thereof with connections of steam railroads is handled in substantially the same way as is such freight by the steam railroads. Regularly scheduled package freight cars are operated by the petitioner in connection with steam railroads to Atlanta, Baltimore, Birmingham, Boston, Charleston, and numerous other distant cities. This service is also in connection with ocean steamship lines. (R. 414, 415.)

The petitioner's solicitation of business, its membership in traffic organizations, the tariffs published and concurred in by it cover the whole of the United States. It maintains traffic managers and commercial agents not only at its home office, but also in Cincinnati and other distant cities. (R 415.)

The petitioner is a member of the American Railway Association, Railway Accounting Officers Association, Railway Treasury Officers Associa-

tion, Southern Association of Car Service Officers, Southern Claims Conference, The Traffic Club of New York, Association of Railway Executives, Southern Freight Association, Southern Weighing & Inspection Bureau, Southeastern Demurrage & Storage Bureau, the membership of which organizations is made up largely of the steam railroads and their officers. Officials of the company are members of the general committee and also the executive committee of the Southern Freight Association with the voting power equal to that of any interstate steam railroad member. (R. 416.)

The petitioner's express business is carried on under standard contract with the Railway Express Agency, Inc. It is a member of the Per Diem Agreement among the steam railroads governing the terms and conditions of interchange of freight cars.

The petitioner publishes 17 general individual tariffs under its own name and Interstate Commerce Commission serial numbers, and participates in numerous other published tariffs in which it is joined with steam railroads. These tariffs provide for through transportation over all parts of the United States from the Atlantic to the Pacific, and in some instances to Mexican and Canadian destinations. From a tariff standpoint the petitioner has the power by changes in its own tariffs to affect the rate structures of steam railroads all over the United States. Between 1916 and 1930 it has filed 303 proposals with the Southern Freight Associa-

tion for changes of through rates to and from points distributed throughout the country. (R. 415–416.)

The revenues of the petitioner are derived largely from its freight business, its passenger revenues, at one time substantial, having steadily decreased, and in 1929 amounted only to 2.9 per cent of the petitioner's total revenues. (R. 416–417.) A very large proportion of the petitioner's revenues from freight business is derived from interchange of freight with interstate steam railroads. In 1929 4.3 per cent of the petitioner's total freight revenues was derived from local freight and 95.7 per cent from interline exchange freight. On the other hand, the petitioner's passenger revenues are derived almost entirely from local traffic, the ratios for 1929 being 97.8 per cent local and 2.2 per cent interline traffic. (R. 417–418.)

The petitioner has, since 1916, been a class I railroad, enjoying operating revenues of more than a million dollars annually. In 1929, the petitioner's total revenue was $2,451,992.34, of which $2,317,528.77 was derived from freight. The petitioner's freight revenues come largely from interstate traffic as distinguished from intrastate. In 1929, interstate traffic produced 80.7 per cent of the petitioner's freight revenues and its intrastate traffic only 19.3 per cent. (R. 418.)

The effect of the traffic agreement between the Piedmont & Northern and the Seaboard Air Line hereinabove referred to appears in a comparison

of the amount of freight interchanged with that line and amount interchanged with other connecting steam lines. In 1927, out of a total of 71,643 carloads of freight interchanged with the petitioner's steam connections, 55,594 carloads were interchanged with the Seaboard. This was 77.6 per cent of the total. In 1928, the interchange with the Seaboard amounted to 78.5 per cent of the total, and in 1929, 76.5 per cent. The average interchange of carload freight between the petitioner and the connecting steam railroads is approximately 6,000 carloads per month. (R. 418–419.)

The beginning of the operation of the petitioner's existing lines resulted in the opening up of new joint through routes and the diversion of a very substantial amount of freight traffic from the steam railroads, which had been carrying the same, to the new routes in which the Seaboard Air Line participated. And, if the petitioner should construct the contemplated extensions, new and important joint through routes would be opened up between Florida and other southeast territories and the northern gateways. (R. 400–422.)

According to the Piedmont & Northern's estimate presented in connection with its application for certificate of convenience and necessity, the construction of the proposed extensions, thereby filling in the gap in petitioner's lines, would result in the diversion from existing steam railroads of 82,320 cars, not including 12,300 cars of bridge traffic carried through the length of its line as an in-

terior connecting link in new through routes. The revenue to be derived from this traffic taken from the steam railroads was estimated at nearly $4,000,000 for the first year, expected to increase progressively at the rate of 8.4 per cent for each year thereafter, reaching $5,822,344 in additional revenues for the sixth year. The intervening steam railroads contend that by reason of the fact that they would lose a longer haul on such diverted traffic than the petitioner would gain, their loss by reason of the proposed construction would be at least twice the amount of the revenue derived by the Piedmont & Northern. (R. 421–422.)

The Louisville & Nashville and the Atlantic Coast Line have recently leased the Clinchfield lines and the former company has constructed, practically to completion, under Commission certificate, a new cut-off line costing over five million dollars, which creates a new direct route to the territories involved. The building of the lines proposed by the petitioner would create a new through route directly competing with and diverting traffic from the route just established by the Louisville & Nashville and the Atlantic Coast Line and obviously diminish the revenues from such route below the figures presented to the Commission in support of the application for certificate. (R. 422.)

As bearing upon the practical results with respect to diversion of traffic and disturbance of existing traffic conditions, the evidence shows that the petitioner company is owned and controlled by the

Duke Endowment Trust. This organization is closely allied in ownership, control, and management with numerous other Duke interests which operate warehouses, factories, steam power plants, and various other mercantile and industrial enterprises in the Piedmont territory, and because of such common control, a great amount of freight movement will be diverted from existing steam carrier routes and handled over the new through routes established in connection with the petitioner's extended lines. (R. 422.)

The facts above set out, which are taken for the most part from the Special Findings of Fact made by the District Judge (and not questioned by the petitioner in its Assignment of Errors), show conclusively that in all respects essential to the proper application of the construction and abandonment provisions of the statute to a particular case, the Piedmont & Northern has the characteristics of the usual steam powered railroad.

In *Kirkpatrick* v. *Piedmont Traction Co.*, 170 N. C. 477, there was involved a suit by an abutting property owner against the Piedmont Traction Company (predecessor in ownership of the North Carolina segment of appellant's line) to recover damages for the laying of track and its operation on the highway adjacent to his property on the theory that it constituted an additional burden on the fee. It appears from the decision that the usual street railway does not, under the laws of North Carolina, subject adjacent property to an

additional servitude. The court held that the Piedmont & Northern's operations were of such character that they did constitute an additional servitude, remarking as follows:

> We are of opinion that, from the nature and description of the defendant's business as given in the record, and the manner in which it operates its freight trains and interurban passenger trains, it should be classed as a "steam railway" and can not be regarded as the ordinary street railway. The matter is not to be determined by the character of the motive power, but rather by the character of the business done, as well as the injury inflicted by it.

True the petitioner's operations are interurban in the sense of being conducted between cities. Similarly, if the word "interurban" carries with it no other meaning than "between cities," the operations of the great trunk lines of the country are likewise interurban, which would compel the strained construction that Congress, in excluding interurban electric railway from Commission authority with respect to new construction, intended that the distinction between them and the steam roads should depend solely upon the character of the motive power. This can hardly have been Congress's intention. The obvious intention is shown not only by the association of the term "interurban" electric railway with street and suburban electric railways, but also by the very fact that the whole of paragraph (22), wherein it is contained,

constitutes an exception from Federal authority in favor of local authority. That intention is that the term should signify railways whose operations are distinctively local and having no substantial effect upon the steam railroads in the vicinity. Measured by such standard the Piedmont & Northern's operations fall far outside the scope of the term "interurban electric railway."

The opinion of the three-judge court (30 F. (2d) 421) contains a comprehensive statement of the local operations upon which the Piedmont & Northern relied in the prior case to distinguish it from the ordinary steam road. The evidence in the case at bar demonstrates the continuance of the conditions down to the end of March, 1930. (R. 183–214.) From said opinion the following excerpts are taken:

> The existing lines of the Piedmont and Northern have connections with the street railway systems of the cities which it serves, acquired either by direct ownership or by contracts for trackage rights. Thereby its passenger cars within the cities en route become street railway facilities. Between the cities there are frequent stops for passengers at an average distance of 1.2 miles apart—that is to say, 106 stops in 128 miles of road. Forty-nine passenger trains daily traverse various parts of the line. There are more daily trains and more frequent stops than on the corresponding mileage of the Southern Railway. Furthermore the spacing between

the trains is more uniform. The passenger cars are motivated by self-contained motor units, and are lighted from a trolly. By reason of their equipment, they are not unacceptable upon steam lines. (L. c. 427.)

* * * * * * * *

The difference between the local freight service of the Piedmont and Northern and that of the steam railroads consists chiefly in the use of the street-railway systems to gather up and deliver freight in the cities, the greater number of local freight stations on its lines between cities, the operation of its freight trains in smaller units and with greater frequency, and of a speedier delivery of local freight between near-by points.

The local passenger and local freight business thus described give to the road the peculiar features upon which the petitioner relies to distinguish it from the ordinary steam railroad. But this business constitutes only a small part of the petitioner's operations. Far greater is its general freight business, made possible by interchange relations with steam trunk lines in the south through which it is connected for the receipt and delivery of property with vast sections of the United States. (L. c. 428.)

That the Piedmont & Northern's passenger and local freight service constitute an insignificant part of its operations is strikingly borne out by the evi-

dence. In 1929, more than 94 per cent of its revenue was derived from freight (R. 417), a very large per cent whereof was carload traffic, moving in trains of from 20 to 45 cars (R. 413). It is safe to say that such operations do not fall within the common acceptation of what constitutes interurban electric railway service. The bulk of the Piedmont & Northern's freight is interchanged with the steam roads. Of all cars of freight handled in 1929, more than 95 per cent were so interchanged (R. 418–419), and, with the proposed lines built, the carrier estimates it will handle 82,000 additional cars in interchange the first year (R. 421). One of the main purposes of the proposed construction is to make of the Piedmont & Northern a link with the steam roads in new through routes for the movement of freight between the North, East, and West, and Florida points. (R. 405–406, 420.) It has estimated that its increased revenue for the first year would be $3,890,016.57 (R. 422) and that for the succeeding five years it would increase each year 8.4 per cent over the preceding year (R. 422).

The Piedmont & Northern Railroad, completed as proposed, would closely parallel existing railroads throughout its entire length and would touch no local point of importance not served by existing lines, and it seems that its expected increase in revenues would be obtained mainly at the expense of those other railroads now serving the locality. (R. 422.)

II

The words "interurban electric railway" have no settled meaning at law and therefore resort must be had to the context and the general purpose of the statute to insure correct interpretation

The Piedmont & Northern's existing lines are, and its proposed lines would be, operated between cities with electric locomotives, but that is by no means sufficient to exclude the proposed construction from Commission authority. The fact that the railroad is, and will continue to be, interurban does not distinguish it from ordinary railroads since the latter are likewise universally operated between cities and towns. The additional fact that it will continue to employ electric locomotives does not necessarily bring the road within the scope of the exception, for certainly it can not be said that the complete electrification of any one of the big trunk-line systems would remove it from the Commission's authority under Section 1 (18). The outstanding conclusions that may be drawn from the courts' decisions differentiating particular electric railways from the "carriers by railroads" subject to the Act are: (1) That resort should be had to the context and the general purpose of the Act to determine whether the particular road's operations are of a kind intended to be subject to the regulatory authority, and (2) that the distinguishing characteristic of such electric railways as are not to be regarded as ordinary railroads, is the essentially local character of their operations, render-

ing them unfitted for doing the acts and committing the mischief intended to be regulated.

In *Omaha Street Ry.* v. *Int. Com. Com'n.*, 230 U. S. 324, the Court, in holding that an electrical railway operating in the streets of Omaha, Nebraska, and Council Bluffs, Iowa, and also interstate between those cities was not a *"railroad"* within the meaning of that term as used in the Act, and that its interstate fares were not, therefore, subject to Federal regulation, was constrained to resort to the context of the Act to determine whether the purposes sought to be attained fitted in with the operations of the particular railroad. After commenting upon the conflict in the decisions of the state and Federal tribunals upon the subject, it was said at page 335:

> But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole.

And again at page 337:

> Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad "subject to the act" being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word "railroad" can not be construed to include street railroad.

And again, in distinguishing this road, which was interurban in that it operated between Omaha and Council Bluffs, from electric interurbans whose operations have a broader scope, the Court said, at pages 337–338:

> But it affirmatively appears that the company was chartered as a street railroad, and hauls no freight and is doing only a business appropriate to a street railroad. So that whatever the motive power or the size or speed of the cars is immaterial. In any event, there were "street cars," referred to in the act of Congress authorizing the construction of the Bridge from Council Bluffs to Omaha. (24 Stat. 501.) The company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs and it is manifest that Congress did not intend that these tracks should be connected with Railroads for hauling freight cars and long trains through and along the streets of Omaha and Council Bluffs.

In *United States* v. *Village of Hubbard*, 266 U. S. 474, the court reached the opposite conclusion as to another electrical interurban railway, namely, that it was a railroad under the Act and subject to provisions forbidding the charging of fares that discriminate against interstate commerce. This decision rests mainly upon the ground that since Congress, in conferring new powers upon the Commission in 1920, expressly excepted certain inde-

pendently operated electric railways from some of the new powers so conferred, it thereby indicated that it "did not intend to deny to the Commission the power to regulate interurban railways in other respects." But this holding does not carry with it, as claimed by petitioner, the further holding that all independent railroads operating between cities and using electric locomotives are interurban electric railways within the meaning of the excepting clauses referred to. In the above case the court, after referring to the cases which hold that the Commission has no jurisdiction over electric street railways with respect to reasonable fares and charges, said (p. 477):

> We have no reason to inquire into the correctness of the latter ruling (*City of Wellsville* v. *United States*, 278 Fed. 769), as we are of opinion that the Commission's jurisdiction to prevent unjust discrimination by interurban electric railroads against interstate commerce is not so limited.

Certainly it could not have been within the contemplation of Congress that, if a Class I railroad, or any other operating between cities, should substitute electric for steam locomotives, thereafter it would not have to come to the Commission for authority to undertake new construction or to issue new securities. In this connection, too, the settled rule of this Court should be kept in mind that excepting clauses to remedial statutes should be

narrowly construed so as not to defeat the remedial processes intended to be accomplished. *Spokane & Inland R. R. v. United States,* 241 U. S. 344, 350.

In *Texas & Pacific Ry. v. Gulf, etc., Ry.,* 270 U. S. 266, involving the question as to whether a proposed track was an industrial track of a kind expressly excepted from Commission authority by paragraph (22) of Section 1 (the paragraph here under consideration), the Court said at pages 277–278:

> In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in forms long prescribed for accounting purposes. It points also to uses made of these terms in other connections by courts, by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property em-

ployed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things, to avert such losses.

When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, "spur, industrial, team, switching or side tracks * * * to be located wholly within one State." * * * But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low

> rates in order to secure traffic enjoyed by another, may be inimical to the national interest. * * *

The tracks, concerning which this Court used the above-quoted language, were intended solely to serve certain manufacturing plants in the vicinity; they were to have no depots, stations, telegraph offices, express, mail, or passenger service; they were to carry neither local nor less-than-carload freight; the tracks came within the definition of "industry tracks" as the term was used by the Commission in its instructions issued for the use of the railroads in making out certain official reports.

The defendant in the case cited, as does the petitioner in the case at bar, asked the courts before which the case was heard to be governed by the literal meaning of the words involved, rather than by the obvious purpose of the Act as a whole. The District Court declined to go along with the defendant's contention (*Lancaster* v. *Gulf, C. & S. F. Ry. Co.*, 298 Fed. 488); the Circuit Court of Appeals, 5th Circuit, reversing the District Court, thought that the policy expressed in Transportation Act, 1920, should not be held to prevail over the "explicit provision" as to industry tracks (*Gulf, C. & S. F. Ry. Co.* v. *Texas & P. Ry. Co.*, 4 F. (2d) 904); while this Court unhesitatingly held that the policy and purpose of the Act constituted a truer guide to the proper construction of the language of the Act.

III

Under the terms of Section 15a the Commission must include the Piedmont & Northern with the steam roads when adjusting rates so as to yield a fair return on aggregate group property value

Excepting clauses in respect of street, suburban, and interurban electric railways appear in two other sections of the Act as well as in Section 1 (22). The exception in section 20a, concerning the issue of new securities, is practically identical with that in Section 1 (22), herein involved, in that it excludes from Commission authority—

> a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation.

Section 15a, which directs the Commission to adjust rates so as to yield a fair return upon the value of the properties of the carriers as a whole, or as a whole in rate groups, and which provides for the recapture of excess income from carriers earning more than such fair returns, excepts from its operation—

> (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight.[1]

[1] Section 15 (3) excepts from the Commission's authority to establish through routes and joint rates those "between

The provisions with which we are here concerned and the above-mentioned sections 20a and 15a were added by the Transportation Act, 1920. Also in the latter Act, section 209, concerning the guaranty to carriers after the termination of federal control, excludes by paragraph (a)—

> a street or interurban electric railway, not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power,

etc., and Section 300, which deals with the Labor Board, excludes by paragraph 1—

> any street, interurban, or suburban electric railway unless such a railway is operating as a part of a general steam railroad system of transportation. * * *

The two latter sections constitute no part of the Interstate Commerce Act. But reverting to sections 20a and 15a we find that the excepting clause in the former is worded substantially the same as that contained in the paragraph herein particularly involved, but that the excepting clause of the latter excludes—

> interurban electric railways unless operated as a part of a general steam railroad system

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street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character." (36 Stat. 539, 551, 552.)

of transportation *or engaged in the general transportation of freight.*

Since more than 94 per cent of the Piedmont & Northern's revenues are derived from freight and the record shows in many other ways the very minor importance of its passenger traffic, it is clear beyond question that it is not excluded from Section 15a, but is, on the contrary, among the railroads enjoying the benefits of the revenue-producing provisions of that section.

IV

The provisions of Section 1 (18)–(22), herein involved, are particularly essential to the plan of Congress set up by Section 15a and other amendments in that they place restrictions upon competitive duplication of lines that would wastefully increase aggregate or group property values, thereby burdening the rates and endangering the financial stability of established systems of transportation

The fact that there can be no question but that appellant is subject to Section 15a is a particularly important consideration in this controversy, for Section 15a and the provisions hereunder consideration are both essential cogs in the machinery set up by the Transportation Act, 1920, with one great objective in view.

This Court has frequently had occasion to pass upon the changes made in the Interstate Commerce Act by the Transportation Act, 1920, and has directed attention to the fact that those amendments are interrelated parts of a whole scheme to attain a particular purpose. Broadly speaking, the pur-

pose was to secure for the country as a whole an effective transportation service, but an effective transportation service, in the sense of transportation furnished at just and reasonable rates (Sec. 15a (2)), could not be secured by provisions looking merely to increased rates. It was necessary to avoid unduly burdensome rate increases. *New England Divisions Case,* 261 U. S. 184, 191. And it was no part of the plan of Congress to permit unrestricted competitive duplication of lines and plant that would wastefully increase aggregate or group property values, thereby unduly burdening rates and endangering the financial stability of established systems of transportation. *Texas & Pac. Ry.* v. *Gulf, etc., Ry.,* 270 U. S. 266. The Act contains many provisions looking to economies in operation, notable among which are those seeking to effect that end through closer cooperation of the carriers in the rendering of a unified general transportation service. It will have been noted that the efficient and economical operations, which are a prerequisite under Section 15a (2) to the fair return provided for, are the operations of the carriers as a whole, or as a whole in rate groups. Economical operation of the carriers as a whole can not exist where unrestricted competitive duplications of service are permitted and, accordingly, Congress enacted provisions intended to make unnecessary the wasteful duplication of facilities, such, for example, as the provisions looking to the common use of terminals and tracks (Sec. 3 (4); *R. R.*

Comm. v. *Southern Pacific Co.*, 264 U. S. 331), and the provisions enlarging the Commission's authority to require the carriers to join in the making of through routes and the establishing of joint rates (Sec. 15, (1) to (6)). Congress at the same time placed direct restrictions upon duplication of plant by requiring the carriers to secure the Commission's authority before issuing new securities (Sec. 20a (1)–(11)) and before undertaking new construction or extension of lines (Sec. 1 (18)–(22)). The latter are the provisions, above quoted, with which we are directly concerned here.

This plan of Congress is made very clear in *Wisconsin R. R. Comm.* v. *C. B. & Q. R. Co.*, 257 U. S. 563; *Dayton-Goose Creek Case*, 263 U. S. 456; *New England Divisions Case*, 261 U. S. 184; *Texas & Pac. Ry. Co.* v. *Gulf, etc. Ry.*, 270 U. S. 266; and *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204. That the particular provisions herein involved, namely, those requiring the Commission's authority for the construction of new lines, are essential to the plan is shown in the *Texas and Pacific Case*, the *Wisconsin Case* at page 585, and in the *Dayton-Goose Creek case* at page 478. In the first above-named case, namely, *Texas & Pac. Ry. Co.* v. *Gulf, etc. Ry.*, 270 U. S. 266, an injunction was sought to prevent a railroad from building a new line without the authority of the Commission. The suit was defended on the ground that what was proposed to be constructed was an industrial track expressly excepted by paragraph (22) from the requirement

that the Commission's authority be first had and obtained. The contention was there the same as made here, namely, that the extension was of a class excepted from the Commission's authority by said paragraph (22). The Court in the language quoted, supra (page 34), considered that the best guide as to whether the proposed line was an extension or was within the excepted classes was furnished by giving consideration to the purpose served by the particular provision in the general scheme of regulation inaugurated by the Transportation Act.

V

The difference between the language of the exception stated in Section 15a and that of Section 1 (22), whereby an electric interurban railroad engaged in the general transportation of freight is expressly kept within the operation of the former section but not specifically brought within the scope of the latter, may be explained and accounted for without construing Section 1 (22) in the manner proposed by the petitioner, which construction would frustrate the remedial purposes of the Transportation Act

As above shown the prevention of wasteful duplication of lines was an essential part of the scheme of the Transportation Act to promote an effective transportation service at just and reasonable rates.

Unquestionably some consideration must be given to the difference in language of the excepting clause of Section 15a and that of Section 1 (22), herein under consideration, namely, to the fact that, while under the express language of Section 15a

an electric interurban is not excluded if it is engaged in general transportation of freight, such a carrier is not mentioned in Section 1 (22). But it does not follow that the inference to be drawn is that asserted by petitioner. The reason for the difference in language and an explanation consistent with the purposes of the Act is that while an electric interurban, which has, in connection with its local business, built up a considerable interstate freight business, should for the sake of uniformity in rates, be included in the general rate adjustments provided for in Section 15a, still if its principal business continues to be the purely local carriage of passengers and small freight, the extension of its lines and facilities for such purposes likewise remains a matter chiefly of local concern and should be left to local authority. But where, as here, the physical railroad, as linked up by the proposed extensions, will cross state lines and where, as here, the usual electric interurban passenger business is inconsequential, the exclusively local passenger and freight buiness is a small proportion of the whole and the avowed purpose of the extension of lines is to assure petitioner of a strong position as a participant in through traffic with large trunk-line railroads, the local interest in the new extensions certainly does not overweigh the federal interest in what was characterized by the lower court as—

> an interior connecting link in a new through route and effective trunk line of connecting carriers leading from Florida on the south

> throughout the southeast and to the northern gateways reached by the Norfolk & Western, and in the reverse direction. (R. 421.)

In *R. R. Com'n. of Calif.* v. *Southern Pacific*, 264 U. S. 331, there was involved the question as to whether Commission authority under these very paragraphs (18)–(22) of Section 1 was necessary for the rearrangement of track necessary in connection with the installation of a new union station, which had been ordered by the State Commission. While the Court conceded that state authority might be exercised to require construction of a small local union station not involving changes in main track or substantial capital outlay, it then went on to say, at page 346:

> But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of section 402 and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission.

Since in the instant case the issue is likewise as to whether the new construction is of a kind to which federal authority attaches or whether of a kind intended to be left to local authority, the above recognition by the Court that the nature of new

constructions and its consequences may constitute a change in kind, rather than in degree, seems particularly pertinent. While in the beginning the Piedmont & Northern's operations may have been principally of local interurban character, its revenues are now 94 per cent derived from freight, 95 per cent carload traffic and mostly interchanged with the steam roads. Its proposed construction would make of it a still more important link in the national transportation system.

To attribute full scope to the difference in language between the exception in Section 15a and the exception in Section 1 (22) seems impossible. Assume that a large trunk-line railroad should completely electrify its lines, it would then, in a broad sense, be an electric interurban railway, but still, because it is engaged in the general transportation of freight, it would be a carrier within the definition of Section 15a whose property value is to be included with that of the other carriers of its rate group as a basis for rates that will yield a fair return. And yet, merely because the electric interurbans, excepted from the Commission's authority over new construction, are not in express words confined to those not engaged in freight transportation, it could, under the construction advocated by petitioner, duplicate the existing lines of competitors and extravagantly swell the aggregate property value of the rate group upon which the public is to pay rates that will yield a fair return.

Likewise, since the language of the excepting clause in Section 20a is the same as that contained in the exception to the Commission's authority over new construction (Section 1 (22)), such trunk line, or those in control of its stock, could issue new securities at will, thereby bringing back the conditions which induced Congress to clothe the Commission with authority over the issuance of new securities by the carriers.

This is entirely contrary to the well thought out and coordinated plan of the Transportation Act to provide an effective transportation service at just and reasonable rates, essential to which is the safeguarding of the revenues of established systems of transportation against wasteful competition. It gives too much weight to the absence of language limiting the excepted electric interurbans to those not engaged in freight transportation and too little weight to the fact that, as aforesaid, the words electric interurban railways have themselves no settled meaning at law, definitely distinguishing them from ordinary railroads subject to the Act.

In *Spokane & Inland R. R.* v. *United States,* 241 U. S. 344, the question was involved as to whether the clause in the Safety Appliance Act excepting from its operation cars used upon street railways rendered that Act inapplicable to cars of an electric interurban which were both in street railway and interstate business. The Court held that the primary provisions of the Act were applicable, stating at page 350:

> We say this because while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in *plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed, that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment.* That the meaning contended for would be in direct conflict with this rule would seem free from doubt, since the inevitable result of sustaining the contention would be to put it in the power of a railroad by operating a train for a trifling distance over tracks within the exception to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute which otherwise would be controlling. (Italics ours.)

Similarly in the case at hand, if a broad construction rather than that called for by the rule, should be given to the excepting clause of Section 1 (22), a steam railroad could by electrifying its lines secure the right thereafter to extend its lines into the territory of other carriers at will. The instant

situation of petitioner's proposed extension of lines without obtaining certificate of the public need therefor would operate quite as much to defeat the safeguards set up by the statute for the protection of carriers and the public. As said by this Court in *Texas & Pac. Ry.* v. *Gulf, etc., Ry., supra,* at page 278:

> But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest.

It should be noted that not only street, suburban, and interurban electric railways are excepted from the Commission's authority over new construction, but also steam carriers not engaged in interstate commerce. This is apparent from the fact that Section 1 (18) applies only to carriers subject to the Act and that Section 1 (1) of the Act limits carriers subject to the Act to those engaged in interstate and foreign commerce. And yet it appears that the Commission has authority over the abandonment by an interstate steam road of a branch line wholly located in one State. In *Colorado* v. *United States,* 271 U. S. 153, the Court in uphold-

ing an order of the Commission authorizing, under this very paragraph (18) of Section 1, the abandonment of lines located wholly within a State over the protest of the State, based its action on the same ground as is here urged in support of the Commission's authority over unnecessary new construction. At page 163 the opinion reads:

> The sole objective of paragraphs 18–20 is the regulation of interstate commerce. * * * The exertion of the Federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*; 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee,* 262 U. S. 318; or when the State authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266.

All of the contemporaneous amendments are interrelated parts of the whole plan of Congress. Each is necessary to ensure shippers that rates ad-

justed pursuant to the Act will not be unfairly placed or based on group property value in excess of the needs of commerce, and to protect the revenues of established lines from wasteful competition. What was said in the *Wisconsin Case, supra,* (p. 586) of the provision relating to burdensome intrastate rates is equally, if not more, applicable to the provisions intended to restrict unneeded new construction, namely, that it is impossible to escape the dovetail relation between that provision and the new policy inaugurated by Transportation Act, 1920.

In the instant case it is proposed to duplicate existing railroad lines. What is commonly understood as local electrical interurban service would be of minor importance, such service being apparent in this case only to an infinitesimal degree. The chief purpose is admittedly to entrench the Piedmont & Northern in a strong position to compete with the steam roads. But the existing roads are shown to be adequate not only for present needs but for a vastly increased volume of traffic and, accordingly, the resulting increasing group-property value as a basis for rates would place an unnecessary burden upon interstate commerce and one entirely out of proportion to the possible improvement in local service.

Therefore, since, as above shown, by far the greater part of the Piedmont & Northern's business is of steam-railway character, and the purpose of the proposed extensions is primarily to enlarge,

and to still further fortify its position in respect of business of that character, it is certain that the Piedmont & Northern is of the class of carrier fitted to commit the mischief which the statute is intended to prevent. This is the only reliable criterion available to determine whether it is among the carriers intended to be regulated or is within the class of carriers intended to be excepted from the statute. Moreover, the rule should be kept in mind that excepting clauses must be narrowly construed so as not to defeat the main objective of the statute (*Spokane & Inland Empire R. Co.*, v. *U. S.*, above quoted from), and that in this case such main objective constitutes an important cog in the machinery set up by Congress to promote an effective general transportation service at just and reasonable rates.

VI

The plan of Congress for an effective general transportation system contemplates that its restrictive provisions as well as those conferring benefits should be uniformly applicable to all carriers constituting real links in the transportation chain

It has been shown that the Piedmont & Northern enjoys the advantages of the revenue producing provisions of the Act. It has also been shown that the main purpose of the proposed extensions of lines is to entrench the carrier more firmly as a link in the chain of the country's general transportation system, and in order to do so it must avail itself of the provisions of the Act making it the

duty of the carriers to afford reasonable and equitable facilities for interchange of traffic (Sec. 3 (3)) and those provisions making it mandatory upon the Commission to establish through routes and joint rates whenever deemed desirable in the public interest.[1] It has been pointed out that one of the purposes of making through routes generally available to the carriers was to eliminate the incentive for the duplication of lines in competitive territory. It has also been pointed out that, while the proposed extensions of lines will go to swell the aggregate or group property value and will seriously deplete the revenues of established lines, they have been found by the Commission not to be needed in the public interest because said established lines afford ample transportation for existing commerce and its reasonably to be expected future growth. Accordingly, it is not reasonable to suppose that Congress intended that such a carrier, participating substantially in the general transportation of commerce engaged in by the steam roads, should be permitted to avail itself of the advantages of certain of said interrelated provisions enacted by the Transportation Act while at the same time refusing to submit to the restrictive provisions to which other carriers are subject and which are

[1] The Piedmont & Northern is enjoying all these benefits, including the Commission's protection against unduly low rates required by State authority. *South Carolina Fares and Charges*, 60 I. C. C. 290.

essential for the welfare of the transportation system as a whole.

CONCLUSION

We respectfully submit that the decree of the lower court should be affirmed.

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APRIL, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932